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No. 88-891

In the Supreme Court of the United States

OCTOBER TERM, 1988

DONALD L. HOLEMAN, PETITIONER

v.

DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY FOR THE NATIONAL FLOOD INSURANCE PROGRAM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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15 pp

TABLE OF AUTHORITIES

Cases:	Page
Edgewater Hosp., Inc. v. *Bowen*, 857 F.2d 1123 (7th Cir. 1988)	5
Fano v. *O'Neill*, 806 F.2d 1262 (5th Cir. 1987)	6
Heckler v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984)	4
Meister Bros. v. *Macy*, 674 F.2d 1174 (7th Cir. 1982)	5
Moody v. *United States*, 783 F.2d 1244 (5th Cir. 1986)	6
Phelps v. *Federal Emergency Management Agency*, 785 F.2d 13 (1st Cir. 1986)	5, 6
Reeves v. *Guiffrida*, 756 F.2d 1141 (5th Cir. 1985)	6
Turrill v. *Life Ins. Co. of North America*, 753 F.2d 1322 (5th Cir. 1985)	7
United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979)	7

Statute and regulations:	
42 U.S.C. 4001 *et seq.*	1
44 C.F.R. Pt. 61:	
Section 61.14	2
App. A(1), Art. VIII	2
Section D	2, 7
Section I	2, 4, 7
Section Q	7

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Petitioner contends that the appeals court erred in upholding the Federal Emergency Management Agency's (FEMA) denial of petitioner's flood insurance policy claim on the basis of petitioner's failure to file a sworn and signed proof of loss statement.

1. a. FEMA directs and manages the National Flood Insurance Program (NFIP), which provides insurance for property damage caused by flood. See 42 U.S.C. 4001 *et seq.* Petitioner insured his property in Wichita Falls, Texas, through NFIP (Pet. 4-5).

Petitioner's NFIP insurance policy expressly stated that, in the event of flood loss, the policy holder must, among other things, "[w]ithin 60 days after the loss, send us a proof of loss which is your statement as to the amount you

are claiming under the policy, signed and sworn to by you" (Pet. App. C11). The policy also stated that the NFIP claims adjuster "may furnish you with a proof of loss form," but warned that such provision was a "matter of courtesy only" and that the insured "must still send us a proof of loss within 60 days * * * even if the adjuster does not furnish the form" (*ibid.*). Thus, the policy did not require a claimant to use a particular proof of loss "form," as long as the document submitted contained all the required information. The federal regulations governing the NFIP policies set forth identical conditions. See 44 C.F.R. 61.14; 44 C.F.R. Pt. 61 App. A(1), Art. VIII § I. The policy and regulations also provide that no policy requirement can be waived without the "express written consent" of the Federal Insurance Administrator. See Pet. App. C10; 44 C.F.R. Pt. 61 App. A(1), Art. VIII § D.

b. Petitioner's property suffered flood damage in 1985. After petitioner timely filed signed and sworn proof of loss statements that were witnessed and signed by the claims adjuster,[1] the government paid petitioner's claim (Pet. 4). On or about June 10, 1986, petitioner's property was again flooded (*ibid.*). Thereafter, petitioner received three letters reminding him of the need to file certain materials (App., *infra*, 1a-5a). On June 26, 1986, a FEMA claims adjuster wrote to remind him of the need to fully document the loss from the 1986 flood by verifying repairs on property damaged in the 1985 flood (*id.* at 1a-2a). This was followed by a letter dated July 8 and signed by a FEMA claims examiner and a FEMA claims supervisor. It called petitioner's attention "to the policy provision which

[1] The proof of loss forms submitted by petitioner, see Complaint for Breach of Insurance, Attachment at 21 *et seq.*, indicate that they were "subscribed and sworn to" before the claims adjuster, Mark McCarthy, on June 21, 1985, and thus belie petitioner's statement (Pet. 4) that the forms "were not sworn."

states that you must file a formal Proof of Loss," and warned him that failure to comply with this condition might result in denial of his claim (*id.* at 3a). On July 28, a claims adjuster again wrote to remind petitioner that the requisite proof of loss had not yet been received (*id.* at 4a-5a).

On August 11, 1986, the day petitioner's time for filing a proof of loss expired, his counsel wrote FEMA to claim $24,806 in losses on petitioner's property resulting from the June 1986 flood. The letter was not sworn to by anyone and not signed by petitioner (Pet. 5; Pet. App. B2-B3). Petitioner never filed a sworn, signed proof of loss (*ibid.*). On September 18, 1986, a letter signed by FEMA claims examiners informed petitioner that his claim had been denied for failure to provide a proof of loss statement and the requested receipts (*id.* at D1). The letter also stated that petitioner's policy prescribed a one year period within which to file suit and that "this office waives no policy provision other than as outlined above and reserves all rights under the above referenced policy" (*ibid.*).

Petitioner filed the present action in the United States District Court for the Northern District of Texas. The court granted the government's motion for summary judgment, holding that petitioner's failure to provide a sworn proof of loss statement justified the denial of his claim (Pet. App. B1-B3). In an unpublished per curiam opinion, the Fifth Circuit affirmed the judgment for the reasons stated in the district court's opinion (*id.* at A2).

2. Petitioner claims that FEMA waived its right to insist on a sworn proof of loss statement and that it should be estopped from demanding compliance with this condition. He contends that this Court should grant review to resolve the "continuing conflict and confusion" among the circuits in the law of estoppel against the government (Pet. 18) and to correct the appeals court's failure to find waiver

or to apply the state law of "substantial compliance" (Pet. 10-11). Because there is no uncertainty concerning the correct application of the law of estoppel or waiver to these facts, this case does not present an issue that warrants further review by this Court.

a. This Court has recently reiterated that a party invoking the doctrine of equitable estoppel against the government must, at a minimum, demonstrate (1) that there was a misrepresentation, and (2) that he reasonably relied on that misrepresentation to change his position for the worse. *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984). Petitioner has not met either of these basic requirements. The requirement of filing a sworn proof of loss was clearly indicated by both his policy and federal regulations. See Pet. App. C11; 44 C.F.R. Pt. 61 App. A(1), Art. VIII § I. FEMA officials never misled him as to his duty or misinformed him as to the prerequisites for a valid claim. To the contrary, petitioner was repeatedly apprised of his legal duty and at least twice advised of the proof of loss requirements under the "terms and conditions of [his] policy" (App., *infra*, 3a); App., *infra*, 4a, [July 28 letter]). Petitioner's suggestion (Pet. 10, 12) that his claim of estoppel is justified by FEMA's failure to immediately acknowledge his August 11 letter, or to object to its contents, is frivolous, since petitioner's time to perfect his proof of loss expired on that day. Thus, petitioner's position could not have changed for the worse before the FEMA letter of September 16. Cf. *Heckler* v. *Community Health Services of Crawford County, Inc., supra*, 467 U.S. at 59. And that letter did advise petitioner that FEMA was rejecting his claim for failing to meet the policy requirements (Pet. App. D1). In sum, the record indicates no direct or indirect misrepresentation by the government or its agents and no detrimental reliance by petitioner.

b. Petitioner implies (Pet. 13-18) that there is a conflict among the circuits concerning the correct application to this case of standards for estopping the government. But any disagreement among the circuits has no bearing on this case, as estoppel would not be available to petitioner under the law of any circuit.

Petitioner attempts to manufacture a circuit conflict by noting the lack of harmony between a First Circuit post-*Community Health Services* case, *Phelps* v. *Federal Emergency Management Agency*, 785 F.2d 13 (1986), and a Seventh Circuit pre-*Community Health Services* case, *Meister Bros.* v. *Macy*, 674 F.2d 1174 (1982). In *Meister*, the Seventh Circuit estopped the government from asserting the untimeliness of a sworn and signed proof of loss form which was made available, completed, and submitted by the FEMA agent out of time, and on which FEMA based partial payment of the claim. However, the Seventh Circuit limited its ruling to the "quite unique [set of] facts" of the case before it. *Meister, supra*, 674 F.2d at 1177. The court expressly declined "to intimate [the] appropriate standard [for estoppel in] future cases." *Ibid.* Thus, the Seventh Circuit's holding has no application to petitioner's case, which is factually distinguishable in a number of respects. Moreover, the Seventh Circuit's recent application, in *Edgewater Hosp. Inc.* v. *Bowen*, 857 F.2d 1123 (1988), of this Court's decision in *Community Health Services* indicates quite clearly that the Seventh Circuit would not find estoppel here. The court in *Edgewater* stated that not only must the party asserting estoppel be ignorant of the facts and demonstrate reasonable reliance on the government's agent, but the government's action must amount to "affirmative misconduct." *Id.* at 1138.

In *Phelps*, a case involving a misstatement by a FEMA agent about the sufficiency of a claim of loss, the First Circuit ruled that, although "[t]he elements of traditional

estoppel are plainly present in this case," 785 F.2d at 16, estoppel was not available, despite the federal agent's misstatement, because all citizens are expected to know the law. Thus, in both *Phelps* and *Edgewater*, the courts sought to apply the standards outlined in *Community Health Services* and held, although for different reasons, that the government could not be estopped. Plainly, the inability of petitioner in this case to demonstrate the threshold elements of estoppel would preclude his success on estoppel in either circuit.[2]

c. Petitioner asserts (Pet. 10) that FEMA waived conditions plainly set forth in the regulations and petitioner's policy. His contention that the swearing requirement was waived by FEMA's supposed "Soliciting Proof of Loss in letter form" (*ibid.*) is unsupported by the plain language of the policy and regulations. The very provisions that make clear that the claimant need not submit the proof of loss on an official form also stress that the proof of loss must be signed and sworn to by the claimant and contain all re-

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[2] Petitioner's claim (Pet. 17) that the standard in the Fifth Circuit is unclear is without basis, see *Fano* v. *O'Neill*, 806 F.2d 1262, 1265 (1987), and *Moody* v. *United States*, 783 F.2d 1244, 1246-1247 (1986), and the Fifth Circuit's decision in *Reeves* v. *Guiffrida*, 756 F.2d 1141 (1985), cited by petitioner (Pet. 17-18), lends no support to his argument. Finding that there were issues of fact bearing on whether estoppel might be available against FEMA, the court in that case reversed the district court's dismissal of a complaint on a flood insurance policy. It stated, however, that "[w]e express no view on whether the plaintiff can, based on the facts of this case, estop the government from asserting the failure to file the proof of loss as a defense." *Reeves*, 756 F.2d at 1145. Thus, *Reeves* neither presented nor applied a standard for estoppel against the government, and in fact expressly declined to do so. Moreover, the *Reeves* court's decision to reinstate the claim turned on the government agent's misrepresentation, and therefore is factually distinguishable from the present case.

quired information. See Pet. App. C11; 44 C.F.R. 61 App. A(1), Art. VIII § I.

Petitioner also contends (Pet. 10) that the September 16 letter rejecting his claim and reminding him of the one year statute of limitations waived the requirement of a proof of loss. However, the pertinent regulation and the policy itself plainly inform the claimant that "[y]ou may not sue us to recover money under this policy unless you have complied with all the requirements of the policy." 44 C.F.R. Pt. 61 App. A(1), Art. VIII § Q; Pet. App. C12. The condition that a claimant comply with all the requirements can be waived only expressly and in writing. 44 C.F.R. Pt. 61 App. A(1), Art. VIII § D. The September 16 letter could not possibly be regarded as such a waiver, since it made no reference to a waiver of proof of loss and in no way addressed petitioner's substantive rights to maintain or to prevail on any claim. Indeed, the letter stated that it waived no provision "except as outlined above." The preceding text did not grant forgiveness of the proof of loss requirement; on the contrary, it stressed petitioner's failure to meet that requirement. A letter that merely advises petitioner of his right to sue cannot constitute a concession that petitioner has satisfied all the prerequisites to suit.

d. Petitioner argues (Pet. 10-12, 19) that this Court should adhere to Texas state law holding that substantial compliance with proof of loss provisions is sufficient. See *Turrill* v. *Life Ins. Co. of North America,* 753 F.2d 1322, 1326 (5th Cir. 1985). However, petitioner concedes (Pet. 19), in accordance with this Court's rulings, that construction of NFIP policies is a matter of federal law. See, *e.g.*, *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) ("This Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs."). Petitioner is

bound by the terms of the policy and the federal regulations controlling the policy, Texas law notwithstanding.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WILLIAM C. BRYSON
Acting Solicitor General

JANUARY 1989

APPENDIX

NATIONAL FLOOD INSURANCE PROGRAM

[SEAL]

GAB Business Services, Inc.
3508 McNiel Suite E
P.O. Box 4806
Wichita Falls, Texas 76308
Telephone 817-692-7781

Service Location

June 26, 1986

RE: Flood Claims of June 10, 1986
FL2016822070; 34446-51580
(1511 31st St., Wichita Falls, TX)
FL2016822062; 34446-51581
(1513 30th St., Wichita Falls, TX)
FL2020787004; 34446-51582
(1511 30th St., Wichita Falls, TX)
FL2014822569; 34446-51583
(1515 30th St., Wichita Falls, TX)

[LOGO]

Mr. Donald Holeman
1515 30th Street
P.O. Box 563
Wichita Falls, TX 76302

Dear Mr. Holeman:

In regard to the above captioned flood claims to your four (4) pieces of property in Wichita Falls, Texas, of June 10, 1986, further information is required in order to process your claims.

As you are aware, you suffered a previous flood claim on June 7, 1985, on all four (4) of the above captioned dwell-

ings. Per instructions communicated to you at that time, no payments can be made for further damages unless you can supply receipts that indicate that you have repaired or replaced, as allowed, the damages from June 7, 1985.

Please forward to me receipts for the repairs to each building detailed above with a breakdown of the repairs accomplished, the date accomplished and the cost for each item repaired or replaced. Also, please forward to this office invoices for the replacement of the contents damaged at 1515 30th Street. Until we have proof, receipts and/or invoices, that repairs were completed after June 7, 1985, your claims for damages cannot be considered for payment.

Regards,

GAB BUSINESS SERVICES, INC.

/s/ L.W. WHITE

L.W. White
ADJUSTER

LWW:clb

NATIONAL FLOOD INSURANCE PROGRAM

[SEAL] July 8, 1986

Donald L. Holeman
POB 563
Wichita Falls, TX 76307-0563

Re: Policy #: 2-0148-2256-9
D/Loss: 6-10-86

Dear Mr. Holeman:

Our records show a pending flood claim under the above referenced policy number and for the above referenced date.

We wish to call your attention to the policy provision which states that you must file a formal Proof of Loss with this company within 60 days from the date of loss. If this is not filed, you have violated the terms and conditions of the policy and your claim can be denied.

This letter is to inform you that you have 30 days in which to resolve your loss with your adjuster and file the papers of documentation with him. If we have received no word from you within the allotted time, we will close our file.

Waiving none, but reserving all rights and defenses under our policy, we remain

Very truly yours,

/s/ D.L. MARKS
D.L. Marks
CLAIMS EXAMINER

/s/ R.J. O'BRIEN
R.J. O'Brien
CLAIMS SUPERVISOR

DLM/RJO/rdm
cc: William E. Love
GAB
CL-10a

NATIONAL FLOOD INSURANCE PROGRAM

GAB Business Services, Inc.
3508 McNiel Suite E
P.O. Box 4806
Wichita Falls, Texas 76308
Telephone 817-692-7781

Service Location

July 28, 1986

RE: Insured: Donald Holeman
Date of Loss: 06-10-86
Claims: FL2016822070 (51580)
FL2016822062 (51581)
FL2010787004 (51582)
FL2014822569 (51583)

[LOGO]

Mr. Donald Holeman
P.O. Box 1747
Humble, TX 77347

Dear Mr. Holeman:

On June 26, 1986, letters were sent to you regarding your flood claims located at 1511 31st Street, 1513 30th Street, 1511 30th Street and 1515 30th Street in Wichita Falls, Texas. At that time, our adjuster had requested receipts for repairs to each building detailed above with a breakdown of the repairs accomplished, the date accomplished and the cost for each item repaired or replaced. To date, we have not received any of this information. A requirement of your policy is that the proof of loss be filed within sixty (60) days of the date of loss. At this time, we are

asking that you please forward to us any receipts or proof that repairs were completed.

Sincerely yours,

GAB BUSINESS SERVICES, INC.

/s/ MARK McCARTHY

Mark McCarthy
SUPERVISING ADJUSTER

MMc:clb

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00077